IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., on Its Own Behalf and on Behalf of Other Charging Parties Under the National Labor Relations Act,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, in His Own Behalf and as Agent for the NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

MILTON SMITH
General Counsel

O. F. WENZLER
Labor Relations Counsel
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C.

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603
Attorneys for the Amicus Curiae

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INTEREST OF THE CHAMBER

The Chamber of Commerce of the United States is a federation consisting of membership of over thirty-seven

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* Pursuant to Rule 42(2) of the Rules of this Court, the written consents of the parties to this case have been obtained and will be lodged with the Clerk of the Court.

hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g., N. L. R. B.* v. *The Boeing Company, et al.*, —— U.S. ——, Nos. 71-1417, 1607; *N. L. R. B.* v. *International Van Lines*, —— U.S. ——, No. 71-895; *N. L. R. B.* v. *Granite State Joint Board*, —— U.S. ——, 34 L. Ed. 2d 422 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N. L. R. B.* v. *Burns International Security Services, Inc.*, —— U.S. ——, 80 LRRM 2225 (1972); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U.S. 655 (1970); and *Los Angeles Herald Examiner* v. *Kennedy*, 400 U.S. 3 (1970).

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally. In issue is the question of when an administrative agency's proceedings can be enjoined if the agency has breached an independent statutory duty owed to those participating in the proceeding. Specifically, the case raises the related issues of (1) whether an administrative agency's failure to promptly produce information subject to disclosure under the Freedom of Information Act (5 U.S.C. § 552) constitutes, as a matter of law, the *prima facie* showing of irreparable injury necessary to warrant issuance of

a preliminary injunction by a district court enjoining an agency proceeding pending resolution of the request for information under the Information Act; and (2) whether the judicial review procedures under § 10(e) or (f) of the National Labor Relations Act (29 U.S.C. § 160(e) (f)) preclude exercise by a district court of its equity powers to enjoin an agency proceeding pending that court's resolution of the disputed request for information.

These issues are of practical significance to the Chamber and its members in that employers, both as charged and charging parties before the National Labor Relations Board, have been denied access to certain information subject to disclosure under the Freedom of Information Act. Absent injunctive relief by the district court, the NLRB would be able to accomplish by delay what it may not lawfully do directly; that is, by engaging in foot-dragging, the Board can delay disclosure of information subject to the Information Act until its usefulness in the underlying agency proceeding has long since expired. This practice has resulted in, and will continue to subject employers to, irreparable injury not adequately remedied under § 10(e) or (f) of the N.L.R.A.

REASONS FOR GRANTING THE WRIT

A. THE PENDENCY IN THIS COURT OF A RELATED AND INTERTWINED ISSUE

The area of law with which the instant petition is concerned relates to an aggrieved party's right to enjoin administrative proceedings in which the agency has committed a breach of its statutory duties causing injury to the aggrieved party's rights and interests. This Court has signified its concern for the importance of this area of law by granting certiorari, on January 23, 1973, in *Renegotiation Board* v. *Bannercraft Clothing Corp.*, No. 72-822. *Bannercraft* presents the question as to whether

courts may enjoin administrative proceedings pending the agency's compliance with its affirmative obligations under the Freedom of Information Act, 5 U.S.C. § 552. The instant case presents the question as to what an aggrieved party need establish to render himself entitled to such an injunction. As a matter logic, the two cases should be decided together in order for the decisional law which emerges to afford any meaningful guidance. While it is true that the adjudication of the second question becomes irrelevant if it is decided in *Bannercraft* that courts may not grant such injunctions, however, it is essential to note that the lower courts, both in *Bannercraft* and in the instant case, held that courts did have such authority. In determining whether to grant the petition for certiorari in this case, therefore, the likelihood of an affirmmance of the *Bannercraft* decision should be assumed. Under those circumstances, a resolution of the issue posed in this case is essential if any clarification in the area is to result. For of what practical consequence is a decision that injunctions of agency proceedings may be secured, if the circumstances under which this may be done remain shrouded in legal confusion? Finally, as is usually true when related questions are being considered, each contributes to the fullest understanding of the merits of the other. Thus, for example, an analysis of the nature of the circumstances in which it would be appropriate to secure injunctive relief against agency proceedings should aid in determining whether such injunctions should ever be permitted at all.

However, even independent of the pendency of the related *Bannercraft* case, the instant petition should be granted by the Court in view of its significance in the proper development of administrative law. The decision below, holding that Sears was not entitled to secure an injunction of NLRB proceedings, despite the Board's breach of its disclosure duties under the Freedom of In-

formation Act, because Sears failed to demonstrate it would otherwise suffer "irreparable harm", should be reversed. Reversal is warranted for the following reasons, in addition to those other factors previously cited by Sears in its petition for writ of certiorari.

B. A PARTY AGGRIEVED BY AN AGENCY'S UNLAWFUL CONDUCT SHOULD NOT BE REQUIRED AFFIRMATIVELY TO DEMONSTRATE ADDITIONAL "IRREPARABLE HARM" BEFORE BECOMING ENTITLED TO ENJOIN SUCH TAINTED AGENCY PROCEEDINGS.

The importance to litigants before the Board of the official documents which were requested and denied here, —an essential element to an entitlement to injunctive relief pending their disclosure,—derives from the nature of the law-making functions of the agency.

The agency is composed of two separate bodies, the General Counsel's Office and the Board itself. The former is charged with the duties, in general, to investigate charges that the law was violated, to decide whether those charges have merit, to determine whether to issue a formal complaint or otherwise to seek a remedy for alleged unlawful conduct and, where merit to such charges is found, either to prosecute those cases in a formal hearing or to settle them without hearing. The Board's role is restricted to a review of decisions which are rendered when complaints are issued and prosecuted by the General Counsel or to a review of the terms of settlement agreements approved by his office in lieu of proceeding to formal hearing.[1] The Board can only act, therefore, in those cases in which the General Counsel elects to

[1] This discussion omits reference to representation matters arising under Section 9 of the Act, which are not pertinent here, and is restricted to unfair labor practice cases arising under Sections 8 and 10.

proceed and only with respect to those issues and theories framed by the pleadings issued by the General Counsel's Office.

Whereas the Board's decisions are published, providing a body of law to guide parties' conduct, the deliberations of the General Counsel are not.[2] Yet the unpublished decisions of the General Counsel constitutes an entire body of law, uniformly directed to and applied by all the Regional offices throughout the country, and having as great an impact upon the interests of those subject to the Board's jurisdiction as do the decisions of the Board itself.

Moreover, the General Counsel's judgment as to whether specific conduct violates the law, as to what theories or questions should be litigated and the reasons therefore, and what relief is (and, conversely, is not) appropriate are all unreviewable conclusions.[3] Under Section 3(d) of the Act, the General Counsel is conferred

> ". . . final authority on behalf of the Board, in respect to the investigation of charges and issuance of complaints under Section 10, and in respect to the prosecution of such complaints before the Board, . . ."

Thus, it is quite literally true that with respect to many important substantive questions there exists an unreviewable and secret body of law which controls the rights and the welfare of all parties before the Board.[4] This

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[2] On a quarterly basis the General Counsel does publish a summary of a few cases which he deems to be of unusual interest. Of the hundreds of other cases coming within his jurisdiction nothing is published, not even a subject matter index.

[3] *Hourihan* v. *NLRB*, 201 F.2d 187 (CA DC, 1953), cert. den. 345 U.S. 930; *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Terminal Freight Cooperative Assn., et. al.* v. *NLRB*, 447 F.2d 1099 (CA3, 1971), reh. den. 461 F.2d 777, cert. den. 81 LRRM 2894.

[4] As a measure of the effect of the General Counsel's current practice of non-disclosure of documents containing an analysis

body of law is codified in two types of documents, the so-called Advice and Appeals memoranda, which consist of the following:

Advice Memoranda: These constitute the General Counsel's analysis and directions to its Regional Directors, following the Directors' investigation of the facts pertaining to a given charge alleging unlawful conduct, as to whether a violation of law has occurred, whether a remedy should be sought, whether a formal complaint should issue, which theories and facts should be relied upon, what law governs in the area involved and what relief should or may be sought. Conversely, this analysis also reveals the basis, where appropriate, for declining to seek relief, totally or in part, and the rationale for declining to exercise other requested or available options.

Appeals Memoranda: Following the Regional Director's determination that a charge, or portions of a charge, lack merit and his consequent refusal to proceed (he may make this judgment either unilaterally or pursuant to an Advice memorandum if one was sought), the aggrieved party may seek review of that decision from the General Counsel's Office of Appeals. The decision issued by Appeals constitutes the final and ultimate agency action concerning the General Counsel's conduct, including the judgment of his Advice Branch, with respect to the issuance of complaint, settlement of cases before such issuance, and the theoretical, legal and factual components of his decisions.

It is these memoranda which Sears, the charging party in the instant case, has unsuccessfully sought from the

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of his judgments and conclusions, the Board itself is unaware of the contents of these documents and cannot address itself to those contents while performing its reviewing and adjudicating functions. The contrary assertion by the court below (app. 4-5) is simply incorrect.

General Counsel under the Freedom of Information Act. The General Counsel's refusal to make them available has, in turn, given rise to an effort to enjoin his further proceedings in this case, pending their submission.[5] As the District Court concluded below, in a finding which

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[5] Sears has pursued this case not merely for the significance of the issue here presented, but because the information which has been sought in the Advice and Appeals Memoranda is of particular substantive importance. The General Counsel has formulated rules covering the area of law involved and, through the dissemination of these memoranda throughout the country, uniformly applies these rules which, thus, become a secret body of substantive law. More specifically, in the underlying administrative proceeding there is presented an issue of first impression which is basic to the very structure of each of thousands of multi-employer bargaining units across the nation: When does collective bargaining commence, as a matter of law, and, as a corollary, at what point is a party precluded from withdrawing from an otherwise voluntary multi-party bargaining relationship. The memoranda sought by Sears over approximately the last two years contain the only existing agency law on this important and recurring issue. The significance of these materials, thus, cannot be minimized. In fact, even the Respondent-Union, in recognition of the importance of these materials, has not objected to continuing the underlying hearing for it, too, seeks to gain access to this body's secret law. In contrast to the national importance of the substantive issues to be resolved in the underlying case, and to the public interest in assuring that any decision is formulated most consistently with the national welfare, the General Counsel has never proposed a single reason why the underlying hearing must go forward without the parties' possession or use of the sought-after documents. On the contrary, there is every reason for doing the opposite. Not only these parties, but all prospective parties before the Board, should be made aware of the rules and conclusions which should guide their conduct and govern the results of their disputes. It is not enough that the agents of the Board be aware of this information and that this body of learning be restricted either wholly or in part to them. The fairest, wisest rules of law will be forged when they can be fully debated by those whom they will affect. The challenged practice insulates what should be openly analyzed and litigated. To the extent that this can be prevented only through injunction of Board proceedings pending such disclosure, that is an appropriate and necessary means for doing so and for enforcing obedience to the Congressional will as expressed in the Freedom of Information Act.

was not disturbed on appeal, by virtue of the powers and duties conferred on the General Counsel by the Labor Act, his Office functions as a separate administrative agency, distinct from the Board, at least for purposes of disclosure under the Information Act. The described Memoranda constitute the final decisions of that separate administrative agency.

Under these circumstances, where an administrative agency charged with a statutory duty of disclosure refuses to make available documents constituting its final decisions in the case to those whose vital interests are not merely affected by but, moreover, are largely resolved by them, such unlawful non-disclosure should be *presumed* to constitute the requisite injury warranting injunctive relief pending the agency's compliance with its statutory duties of disclosure under the Information Act.

The justification for this presumption flows from several sources:

First, without an opportunity to examine the contents of the subject documents, the party requesting them,—who is a full and formal party to the proceedings,—cannot and should not be expected to establish that the non-disclosure of their specific substantive contents works "irreparable" harm to its interests or to the effective prosecution of its case before the Board.

Second, the nature of those documents is such that it is inevitable that their non-disclosure will often work substantial injury to the parties' rights. For example, where the General Counsel takes some action adverse to a charging parties' interests in reliance upon the contents of an Advice memorandum, absent its disclosure the charging parties are unable to make an effective appeal to the Office of Appeals; they cannot be expected to intuit the range of arguments, theories and authorities advanced by the Advice section and may thus pro-

ceed on parallel rather than intersecting lines to the Office of Appeals. Further, absent disclosure of the Appeals memoranda, should those be adverse, the charging party would be unable to pursue entirely legitimate avenues to the courts to protest possible General Counsel abuse of discretion or failure to adhere to his statutory obligations,[6] the predicate for which may emerge only from a reading of the full analysis prepared by the Office of Appeals. Moreover, the non-disclosure of these memoranda will frequently prejudice the presentation of the charging party's case should the matter go to formal hearing. Thus, for example, the General Counsel's agents may misinterpret the contents of the documents; they may not be skillful or alert to the full potential of the material contained therein; they may not understand or foresee the implications of the material, where those implications may have greater significance to the charging party's ultimate welfare than the immediate principles discussed; and, for whatever reasons, they may not follow the directions or instructions contained in those memoranda. Finally, in this connection, differences in emphases may well yield differences in results; the independent judgment of the charging party applied to the contents of these documents could very conceivably produce a successful result not otherwise obtainable. Absent full disclosure of the memoranda, the primary party to the proceeding,—the party aggrieved by the charged violation of law,—would have no opportunity to maximize its litigation posture or to protect its rights and interests from the deliberate or unintentioned adverse acts of others with respect to information and conclusions of which it would be unaware.

Third, such injury to the interests of the parties as would result from an agency's improper refusal promptly to disclose information is inherently irreparable. Even

[6] *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

should the Board or the courts subsequently reverse or remand proceedings to afford an improperly denied opportunity for inspection and use of the subject memoranda, there is no restoration of the status quo. Wholly apart from the wasteful and unnecessary expenditure of time and effort in the initial proceeding, there is no provision in law for compensation from the Board for the necessarily large expenses incurred in the first hearing. Then would follow a second duplicating proceeding involving further expenditure of effort, time and funds. The avoidance of such duplicative and repetitive proceedings is an approved objective of our legal system.[7] It may be true that the integrity of the administrative process may forbid the granting of injunctive relief whenever it is alleged that agency procedures are irregular.[8] However, neither Sears nor the Chamber seeks a rule or result whereby any act of agency misconduct would give rise to an injunction of its proceedings. Rather, a distinction should be drawn between two forms of alleged administrative irregularity. Where the agency's misconduct arises in connection with some act or decision which is entrusted to agency discretion, there is some warrant for concluding, as the court below did, that ". . . this is a risk of litigation that is inherent in society . . .". However, where the agency's misconduct involves its refusal to obey an express statutory command promptly to do a specific act, as is involved in this case, and that refusal necessarily or inherently adversely affects the parties before it for the reasons previously given, then the agency can no longer state "the integrity of the administrative process" as a basis for resisting interruption of its proceedings.

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[7] *UAW* v. *Scofield*, 382 U.S. 350 (1965).

[8] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

As a consequence of all of the factors discussed above, it follows logically and necessarily that the General Counsel's disobedience of his statutory mandate should give rise to the *presumption* that his malfeasance has caused the requisite injury to warrant injunctive relief. This would, of course, be a rebuttable presumption. However, the duty to illuminate those considerations which would rebut this presumption would be the burden of the General Counsel. Only if he seeks to sustain it would the parties be required to come forward affirmatively and additionally to establish that the requested injunctive relief is equitably warranted by extrinsic circumstances. Such a result is further in accord with the salutary proposition that the party who commits a wrong should be compelled to demonstrate that the effects of that wrong do not warrant relief, rather then place the burden upon the party who is aggrieved and who, in this context, lacks information to make a full case on its own behalf.

In the instant case, the court below imposed upon the wronged party the duty to show "irreparable harm". Despite the presence of the factors discussed above which do establish such harm, despite the agency's failure to come forward with mitigating considerations and despite the agency's failure to disclose the information sought during nearly a two year period after it was requested and in the face of the statutory command that the agency do so "promptly", the court below granted the General Counsel's motion for summary reversal of the district court's decision and order enjoining the agency's proceedings. In light of the considerations advanced here, this Court is urged to reverse the decision below.

CONCLUSION

Absent injunctive relief pending a district court's decision on a Freedom of Information Act claim, administrative agencies could, by delay or inaction, withhold information subject to disclosure under the Act until its usefulness in the administrative proceeding had long since expired. In *Bannercraft*, this Court will consider (and we believe uphold) the district courts' jurisdiction to enjoin administrative proceedings pending agencies' compliance with its affirmative obligations under the Freedom of Information Act. Assuming, *arguendo*, that the Court recognizes this jurisdiction, it is of the utmost importance that the jurisdiction thereby confirmed not be rendered nugatory by imposing, as a condition to providing such injunctive relief, a burden upon aggrieved parties to agency proceedings which is not only difficult, but nearly impossible, to sustain. Absent the sensible allocation of the burden of proof asserted here and by the petitioner, the jurisdiction of district courts to enjoin administrative proceedings pending an agency's compliance with the Freedom of Information Act will generally be unavailable to aggrieved parties even under the most compelling circumstances. If the benefits which Congress intended to confer by the Freedom of Information Act are not to be lost, this Court should grant the petition.

For the reasons stated above, together with those previously cited and argued by the petitioner, the Court is urged to grant the petition for writ of certiorari herein.

Respectfully submitted,

MILTON SMITH
General Counsel

O. F. WENZLER
Labor Relations Counsel
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA
1615 H Street, N.W.
Washington, D. C.

JERRY KRONENBERG
BOROVSKY, EHRLICH & KRONENBERG
120 South LaSalle Street
Chicago, Illinois 60603

Attorneys for the Amicus Curiae